Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1832

JERRY CARTER SKINNER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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June 26, 1978

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JERRY CARTER SKINNER,

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COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner Jerry Carter Skinner respectfully prays that a Writ of Certiorari issue to review the Judgment of the Virginia Supreme Court entered in this case on March 29, 1978.

OPINIONS BELOW

The Judgment of the Supreme Court of Virginia from which this review is sought is reported as Record No. 771802 of the Supreme Court of Virginia and is printed in the Appendix, *infra*, p. A-1.

The ruling of the Prince William County Circuit Court from which the appeal to the Supreme Court of Virginia was taken is not reported.

JURISDICTION

The Order of the Supreme Court of Virginia was first rendered on March 29, 1978. The Order is reprinted in the Appendix, *infra*, p. A-1 and is presently reported as Record No. 771802 of the Supreme Court of Virginia. This Petition for a Writ of Certiorari was filed within ninety (90) days from that date. Petitioner respectfully prays that this Court exercise the discretion vested in it under 28 USC Section 1257(3) and grant the Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the arrest of Defendant Skinner by Officer Poindexter lacked probable cause and thereby violated the Fourth and Fourteenth Amendments to the United States Constitution.

2. Whether the statement by the Commonwealth's Attorney in the presence of the jury that two indictments were pending against the Defendant was prejudicial and was not properly cured by the court, thereby violating the due process clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS

The following provisions of the Constitution of the United States are involved:

AMENDMENT IV: The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV, Section I: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person's life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At 2:15 a.m. on October 8, 1976, Steven P. Blevins was employed by and working at Stringer's Exxon station in Prince William County, Virginia when a blue or silver station wagon pulled in at the refreshment stand. The driver got out of the car and stated that his generator was throwing sparks out, and that the car was cutting off on him.

As they were looking at the engine, the passenger wearing a ski mask got out of the car with what Blevins described as a single barrel 12 gauge shotgun, pointed it at Blevins and told him to go into the bathroom. The passenger told Blevins to lay face down on the floor, and then put his hands behind his back, tied his hands and feet, and took money from his wallet.

Officer Walter Poindexter of the Prince William County Police Department was on routine patrol at the time and monitored a broadcast given by the dispatcher to watch for two black males, one armed with a single barrel shotgun, believed to be driving a faded blue or silver station wagon, which was believed to be a 1967 Impala station wagon. No license tag number or state of registration were noted. Officer Poindexter observed a blue station wagon westbound on Davis Ford Road, pulled behind it and followed it. Approximately one-quarter of a mile down the road, the right turn signal flashed. The car then made a left turn into a private driveway. Poindexter overshot the driveway, went approximately one hundred yards, turned around and pulled in behind the car, identified as a 1967 Oldsmobile station wagon, occupied by two males. Poindexter had a spotlight on the car and a shotgun pointed at them when he stopped the car. The driver left the vehicle, raised the hood, and after Poindexter called to him from the PA system, came around the rear of the vehicle. The passenger, upon direction from Poindexter, got out of the car. Officer Poindexter had the suspects covered with a shotgun. The individuals were then searched by Officer Schaul and the vehicle was searched by Officer Poindexter. Officer Schaul's search of the individuals revealed no evidence. Poindexter then found a 410 gauge shotgun broken down into three pieces sticking out from the passenger's side of the front seat. The individuals were then read their rights, taken to the station and formally charged. The car was then searched pursuant to a search warrant, at the station, where $124.00 in U.S. currency and a small gym type bag containing a multi-colored hat and a blue mask were seized. Officer Poindexter never copied the description of the suspects, nor did he observe the number 1 inspection sticker while the car was stopped on Davis Ford Road.

Petitioner was indicted by the Grand Jury on February 7, 1977. A Motion to Suppress the Evidence was heard on August 26, 1977 by the Circuit Court of Prince William County, said

Motion being denied. On September 7, 1977, the court, sitting with a jury, heard all of the evidence on the charge of robbery pursuant to Section 18.2-58 of the 1950 Code of Virginia, as amended. Immediately following the Defendant's plea of not guilty to the aforesaid charge of robbery, and in the presence of the prospective jurors, the Commonwealth Attorney interrupted the trial Judge and stated "there are two indictments against this man." Defendant's counsel objected to the prosecutor's statement as prejudicial to a fair trial and moved for a mistrial. The trial Judge denied the motion and failed to give any curative instruction to the jury. Thereupon, after hearing all of the evidence, the jury found the Defendant guilty of robbery and set his punishment at fifteen (15) years in the penitentiary. The Court sentenced the Defendant according to the verdict of the jury on September 7, 1977, to fifteen (15) years in the penitentiary.

The trial Court decision was appealed by filing a Notice of Appeal on September 19, 1977. The Petition for a Writ of Error alleged: that the arrest of Defendant Skinner by Officer Poindexter lacked probable cause and was therefore unlawful; that the statement by the Commonwealth's Attorney in the presence of the jury that two indictments were pending against the Defendant was prejudicial and was not properly cured by the Court; and, that the warrantless search of the vehicle and the search of the vehicle with a warrant while the Defendant was under arrest and the resulting seizure of evidence were unlawful (See Appendix, *infra*, p. A-4). The Petition for a Writ of Error was filed with the Supreme Court of Virginia on December 2, 1977, and the petition for appeal was denied by the Court on March 29, 1978. The Notice of Appeal pursuant to Rule 10 and Rule 33 of the Rules of the Supreme Court of the United States was filed with the Clerk of the Supreme Court of Virginia on June 15, 1978.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant The Writ Of Certiorari Because The Warrantless Arrest Of Petitioner Was Without Probable Cause And Therefore Violative Of The Fourth And Fourteenth Amendments.

The standard for an arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Mr. Justice Powell, speaking for the Court in the *Gerstein* case, opined that "This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the state's duty to control crime." 420 U.S. at 112.

The Court quoted from *Johnson v. United States*, 333 U.S. 10 (1948), where several officers arrested the defendant without a warrant on the grounds that there was an odor of narcotics coming from an apartment dwelling. The officer entered the apartment and arrested the defendant. The Court held that the arrest without a warrant was unlawful since no suspect was fleeing or likely to take flight, and since no evidence or contraband was threatened with removal or destruction. The Court concluded that

> If the officers in this case were excused from their constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case where it might be required. At 13.

The evidence in the trial court supports Petitioner's contention that the arrest was unlawful and without probable cause. When Officer Poindexter shone a spotlight on the car in which Petitioner was a passenger, he ordered him out of the car

and covered him with a shotgun, thereby placing him under arrest. No probable cause existed for Officer Poindexter to detain or to arrest the Petitioner. The facts known to the arresting officer clearly do not meet the standards for probable cause. The description of the car which was allegedly used in the robbery was that of a blue or silver 1973 Impala station wagon. There was no mention as to the state of licensing of the vehicle, or of the license plate number of the vehicle. The description of the defendants of two black males was vague and incomplete, since there was no mention of their height and weight, type of clothing, or other distinguishing characteristics. Furthermore, there is no indication that the defendants were known prior to this time by the police officer or were in any way suspected of any related crime. In addition, when the police car pulled in behind the car in which the Petitioner was riding, no furtive gestures by the Petitioner were observed and the Petitioner made no attempt to flee the scene or in any other way act suspiciously. The car in which Petitioner was riding was merely stopped in a private driveway.

Mr. Justice Powell speaking for the Court in *Gerstein v. Pugh*, held that

> To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has *required* that the existence of probable cause be decided by a neutral and detached magistrate whenever possible (emphasis added).

In quoting from *Johnson v. United States*, the Court stated

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by

> a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

A very practical consideration which arises out of this case involves the alternatives open to the officer in preserving a weak lead on a robbery case balanced against the individual's right to due process of law. In this situation, after having stopped the vehicle the officer couid have taken down the license plate number, recorded a more complete description of the vehicle, and required the production of a drivers license and vehicle registration. Short of making an arrest on general suspicion the officer could have preserved the lead with identification information.

The Fourth Circuit in *Jones v. Peyton,* 411 F.2d 857 (4th Cir., 1969) adopted the Supreme Court ruling of *Davis v. Mississippi,* 394 U.S. 721 (1969) that

> summary arrests and searches on general suspicion, without warrants or probable cause are intolerable even if in a particular instance such police behavior proves fruitful. 411 F.2d 857 at 862.

The law is clear that the determination of probable cause must be made on the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Draper v. United States,* 358 U.S. 307 (1959). The underlying principle is that this determination, whenever possible, must be made by a neutral and detached magistrate. The facts in this case show that the probable cause determination was made by an investigating police officer who was much involved in the apprehension of the Petitioner. Petitioner contends that the probable cause standard was not met.

On the issue of probable cause, the Virginia Supreme Court has likewise held that mere suspicion or vague generalities are insufficient to satisfy the probable cause to arrest standard.

In *Guthrie v. Commonwealth,* 186 S.E.2d 68 (Va. 1972), the Deputy Sheriff had knowledge that a burglary was committed by three men, one wearing a jacket with a large square design and driving a blue pick-up truck. Several days later, the sheriff saw a blue pick-up truck occupied by three men, one of whom was wearing a jacket with large squares on it. He followed the truck for a substantial period of time and then, after the truck had stopped near a house, saw the men running between the house and the truck with goods. When he stopped the truck, he saw objects in the back of the truck covered with a sheet, in addition to a small television set in the cab and "a leg or something under the sheet." Although the Virginia Supreme Court in *Smith v. Commonwealth,* 186 S.E.2d 65 (Va. 1972), held that the facts were sufficient to constitute probable cause to arrest the individuals, the Court reversed and remanded in the companion case of *Guthrie v. Commonwealth.* The Court in *Guthrie,* which had no testimony on the record concerning the design of the coat with a large square design, held that

> Brown's failure to testify here, as he did in *Smith,* as to why the blue truck with three occupants, one wearing a conspicuous coat, aroused his suspicions is fatal to the Commonwealth's case. At 604.

Likewise, in the *Skinner* case, there was no testimony to indicate why Skinner aroused the suspicions of the officer. He was not physically described, was not wearing any conspicuous clothing, and made no furtive gesture while the car in which he was an occupant was parked in a private driveway. Based upon the *Guthrie* decision, which is factually similar to this case, there is insufficient evidence to establish probable cause for the arrest.

In *McMillon v. Commonwealth*, 184 S.E.2d 773 (Va. 1971), the defendant was convicted of possession of narcotic drugs. To establish probable cause for a warrantless arrest, the Commonwealth relied upon the following facts which were known to the police officer at the time of arrest: 1) Three months earlier, the defendant had been treated at a local hospital for an infection of the vein in his left arm; 2) Personal observation of people leaving the defendant's room frequently between midnight and 2:30 a.m. for several months; 3) hearsay evidence that known drug addicts had frequently visited the defendant's room and that hypodermic needles and syringes had been seen in his room; and, 4) that a package addressed to the defendant's wife had been delivered to his room.

The Virginia Supreme Court held that these general facts, when considered together, did not constitute probable cause to arrest the defendant. Likewise, in the *Skinner* case, a series of vague generalities known by the detective are insufficient to establish the necessary probable cause to arrest.

II. The Court Should Grant The Writ Of Certiorari Because The Statement Of The Commonwealth Attorney In The Presence Of The Jury That Petitioner Had Two Indictments Pending Against Him Was Prejudicial And Denied The Petitioner A Fair And Impartial Trial According To The Due Process Of Law.

The constitutional safeguards of due process require that a criminal trial be conducted according to the established rules of procedure or rules of practice free from prejudicial error. *Powell v. Alabama*, 287 U.S. 45 (1932). Due process of law requires that prosecutions cannot be brought about by methods that offend a sense of justice. *Rochin v. California*, 342 U.S. 165 (1952). Numerous jurisdictions have ruled that a prosecutor's statements of other offenses allegedly committed by the defendant in the presence of the jury are error. *United States v. Fisher*, 477 F.2d

300 (4th Cir. 1973) (where the district attorney introduced testimony of an unrelated assault charge); *State v. Tallie*, 337 So.2d 504 (La. 1976) (where the court held that even an indirect reference by a prosecutor to an unrelated crime allegedly committed by an accused is prejudicial error); *People v. Patterson*, 358 N.E.2d 1164 (Ill. 1976) (where the prosecutor suggested that the defendant had a prior record by improperly stating that he had used an alias. The court held, in stating that there was prejudice, that "In a sense it was more damaging than proof of other specific criminal offenses because it left the jury to speculate upon the insinuation that the defendant had a prior record without stating what it was."); *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969) (where the prosecutor asserted that a witness was afraid of the defendant without any evidence before the court on that point); *United States v. Simmons*, 476 F.2d 33 (9th Cir. 1973) (where the prosecutor commented on defendant's criminal record); *United States v. Guglielmini*, 384 F.2d 602 (2nd Cir. 1967) (where the prosecutor commented on defendant's connection with another bankruptcy fraud).

The Virginia Supreme Court recently spoke to this precise issue in *Saunders v. Commonwealth*, 237 S.E.2d 150 (Va. 1977) where, in a murder case, the Commonwealth Attorney made a statement in the presence of the jury that a venireman stated on voir dire that he had seen defendant with the victim on a delivery truck. The Virginia Court held that

> . . .if the prejudicial effect of the impropriety cannot be removed by the instructions of the trial court, the defendant is entitled to a new trial. 218 Va. 294 at 303.

See also, King v. Commonwealth, 234 S.E.2d 67 (Va. 1977).

Similarly, in *Greeson v. State*, 226 S.E.2d 769 (Ga. 1976), where the prosecutor informed prospective jurors of certain criminal allegations against the defendant, the Georgia Court ruled that

The trial court itself should have rebuked the district attorney and by all needful and proper instruction.

The facts in this case clearly conform with the rulings of the state courts. The Commonwealth Attorney, in the presence of the prospective jurors, stated that "There are two indictments against this man." Defendant's counsel outside the hearing of the prospective jurors then explained to the Court that there were in fact two indictments against the Defendant, but that he had purposely asked for separate trials. The Court refused to dismiss the jury panel, and failed to give curative instruction. One of the first things that the jury heard was that the Petitioner had two indictments against him. The clear inference was that Defendant had committed several crimes. *The error was never cured by instruction or comment from the court.*

Petitioner contends that this Court should reverse and remand this case on the basis that the uncured prejudicial comments by the Commonwealth Attorney resulted in a denial of Petitioner's right to a fair and impartial trial in accordance with due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

The case against Petitioner was built around an arrest which was unlawful because the necessary probable cause was not present. The unlawful warrantless arrest violated the probable cause standard in the Fourth Amendment and the Due Process Standard in the Fourteenth Amendment of the Constitution of the United States of America. Additionally, the uncured prejudicial comment by the Commonwealth's Attorney in the presence of the jury that "There are two indictments against this man" denied Petitioner of due process of law.

Respectfully submitted,

CHARLES W. SICKELS
10560 Main Street
Fairfax, Virginia 22030
(703) 591-9200

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 1978, three copies of the Petition for Writ of Certiorari were served upon Respondent by depositing same in the United States Mail, postage prepaid, in an envelope addressed to the Honorable J. Marshali Coleman, Attorney General, 1101 East Broad Street, Richmond, Virginia 23219, and to Paul Ebert, Commonwealth Attorney, 9304 Peabody Street, Manassas, Virginia 22110. I further certify that all parties required to be served have been served, pursuant to Rule 33 of the Rules of the Supreme Court of the United States.

CHARLES W. SICKELS
10560 Main Street
Fairfax, Virginia 22030
(703) 591-9200

APPENDIX

APPELLANT'S PETITION FOR APPEAL

DENIED 3-29-78

Record No. 771802
Circuit Court No. 6779

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY, THE 29TH DAY OF MARCH, 1978.

JERRY CARTER SKINNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

From the Circuit Court of Prince William County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

No. 6779

COMMONWEALTH OF VIRGINIA

v.

JERRY CARTER SKINNER

NOTICE OF APPEAL

TO THE CLERK OF THE CIRCUIT COURT
OF PRINCE WILLIAM COUNTY:

NOTICE is hereby given that JERRY CARTER SKINNER appeals from the final Order entered in this case on September 7, 1977, in which the Defendant, Jerry Carter Skinner was sentenced according to the verdict of the jury on September 7, 1977, to fifteen (15) years in the penitentiary on an indictment for armed robbery. A transcript of the suppression hearing which was heard on August 26, 1977 and a transcript of the trial will be filed hereafter.

JERRY CARTER SKINNER
By Counsel

FARLEY, HARRINGTON & SICKELS
/s/ Charles W. Sickels

Charles W. Sickels
Suite 211, The Mosby
10560 Main Street
Fairfax, Virginia 22030
Counsel for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing instrument was mailed, postage prepaid to Paul Ebert, Esq., Commonwealth Attorney, Prince William County, 9304 Peabody Street, Manassas, Virginia 22110, on the 16th day of September, 1977.

/s/ Charles W. Sickels
Charles W. Sickels

APPELLANT'S MOTION TO SUPPRESS EVIDENCE
DENIED 8-26-77

Criminal Nos. 6779 and 6780

VIRGINIA:

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA

v.

JERRY CARTER SKINNER

MOTION

COMES NOW, the Defendant, Jerry Carter Skinner, by Counsel, and moves the Circuit Court of Prince William County to suppress any items seized from the 1967 Oldsmobile station wagon on October 8, 1976 in Prince William County following the arrest of the Defendant, and in support thereof states as follows:

That the Prince William County police officer who arrested the Defendant was without probable cause for Jerry Carter Skinner's arrest and the search of the vehicle was unreasonable and in violation of the law of the Commonwealth of Virginia and the United States Constitution.

WHEREFORE, the Defendant, by Counsel, moves to suppress the evidence seized from the vehicle on the night of the arrest.

JERRY CARTER SKINNER
By Counsel

FARLEY, HARRINGTON & SICKELS

/s/_____
Charles W. Sickels
Suite 211, The Mosby
10560 Main Street
Fairfax, VA 22030

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have sent a true copy of the foregoing Motion to the Commonwealth Attorney, 9304 Peabody Street, Manassas, Virginia 22110, this 10th day of August, 1977.

/s/_____
Charles W. Sickels

EXCERPTS FROM TRANSCRIPT OF THE
SUPPRESSION HEARING IN
THE PRINCE WILLIAM CIRCUIT COURT

AUGUST 26, 1977

TESTIMONY OF OFFICER POINDEXTER

T. M. pp. 14-19

DIRECT EXAMINATION

BY MR. SICKELS:

14. Officer, please state your full name and your employment.

A. Officer Poindexter, Police Officer, County of Prince William.

Q. And how long have you been employed as a police officer with Prince William County?

A. Approximately two years.

Q. And have you been a uniformed police officer all that time?

A. That is correct.

Q. Directing your attention now to October 8, 1976, did you have occasion to respond to an armed robbery call?

A. I did not respond to the call; I monitored a radio dispatch from our headquarters that an armed robbery was taking place at a gas station in Woodbridge, located at 12850 Gordon Boulevard.

Q. Is that the north part of Woodbridge?

A. Yes, sir, it is.

Q. And to the best of your recollection, what was the transmission that you received?

A. There was a look-out given by Dispatcher Miller for two black males, one armed with a single-barrelled shotgun, driving a faded blue or silver station wagon, believed to be a 1967 Impala, Virginia tags unknown.

Q. Was any description given of the black males?

A. At that point, no, sir.

Q. And are you refreshing your recollection at this point with your own notes?

A. I am.

Q. Did you receive any subsequent transmissions of any further information?

A. Yes, sir. The initial broadcast took place at approximately 2:20 o'clock a.m. on the 8th. Officer Phil Riley arrived on the scene at Springer's Exxon at 2:21 o'clock and at approximately 2:23 o'clock, he gave a supplemental broadcast from the scene for, again, two black males operating what was believed by the victim to be a 1967 Impala station wagon with a number 1 Virginia inspection sticker on the windshield.

The vehicle color was faded blue or silver. He advised them in the broadcast that he would give a description of the two suspects shortly, and that was the extent of the broadcast.

Q. Did you ever receive a transmission, a description of the suspects other than two black males that you copied?

A. Not that I copied. He was beginning a description when I observed the vehicle.

Q. Did there ever come a time when you saw what appeared to be a vehicle that you assumed to be related to the robbery?

A. Yes, sir. I was on Hoadly Road when the initial broadcast was given out. I proceeded northbound to Davis Ford Road and sat at the intersection approximately 50 feet from the intersection with my lights out, just observing the intersection.

And, at approximately 2:30 o'clock a station wagon passed the intersection westbound on Davis Ford Road, and this was shortly after another officer had radioed that a citizen had advised him that a vehicle matching the description of the suspects was westbound on Davis Ford Road at a high rate of speed.

Q. Do you know if the citizen said the vehicle was an Impala or what?

A. No, sir, I don't. The only information that was given was that a station wagon fitting the description of the suspect vehicle had passed him westbound on Davis Ford Road, and this was at approximately Occoquan Road, Route 253.

Q. So you didn't know whether it was a Chevrolet or whether it was a Virginia tag or the tag number or who was in the car from that transmission, is that correct?

A. Which transmission? I don't understand.

Q. Your latest transmission you just referred to—that a citizen had advised—you didn't know if the citizen saw a vehicle that was a '67 Chevrolet or what?

A. Basically that is correct. He said a station wagon matching the description.

Q. Then what contact did you have with this vehicle that the Defendant was riding in?

A. Okay. The vehicle passed me, passed the intersection westbound on Davis Ford Road, and I pulled out behind it just as Officer Riley began transmitting a description of the two suspects.

I was attempting to overtake the vehicle on Davis Ford Road. This was approximately 2:27 o'clock a.m. The vehicle was a faded blue station wagon, and as we were passing the Marumsco Baptist Church which is approximately a quarter of a mile west of Hoadly Road on Davis Ford, the left turn signal of the vehicle began—or correction, the right turn signal on the station wagon—began to flash.

And at that point there was no place to turn right. There was nothing but woods on the right-hand side. Apparently, the driver realized this and then gave a left-turn signal and turned into a private driveway just east of Azdee Lane.

Q. At what point did you determine the make of the vehicle?

A. Not until I pulled up behind the vehicle in the driveway.

Q. And what was the make of the vehicle?

A. The make was an Oldsmobile, 1967.

Q. And it was blue?

A. It was a faded blue, yes, sir. It was kind of a silvery blue.

Q. And did the vehicle have to slow down to make this left-hand turn?

A. Yes, it did.

Q. Did it slow down before that when it tried to turn right or gave a right-hand turn signal?

A. Somewhat. It did not slow down as though to stop or complete a turn. It slowed down as if the driver were looking.

Q. And when it pulled into the private driveway, was the front of the vehicle facing off the road and the rear of the vehicle closest to the road?

A. Yes, sir. The vehicle stopped with the rear end on the road and the front wheels into the driveway.

TESTIMONY OF OFFICER POINDEXTER CONTINUED

CROSS EXAMINATION

BY MR. ROBESON:

T. M. P. 26

9. When were you able to first see the inspection sticker?

A. I did not notice the inspection sticker until the vehicle was at Garfield. I was concentrating on the two suspects.

T. M. P. 27

12. Was it travelling fast when you observed it on Davis Ford Road?

A. I never got to run a pace on the vehicle when I was attempting to overtake it. It appeared to be running somewhat above the speed limit. I was running faster than the speed limit in trying to catch up to it.

T. M. P. 29

5. And you were in pursuit of the vehicle when you followed it into the driveway?

A. I was not actually in pursuit. I was following it trying to get a better look at the occupants of the vehicle.

Q. When did you first realize that there were two Negro males in the vehicle?

A. As the vehicle turned left into the driveway, the vehicle was facing downhill somewhat, and the driveway rose back up—the reflection of the headlights on the gravel of that vehicle silhouetted the two occupants of the car as I was behind them, and due to their haircuts—their haircuts appeared to be Afro-style—they appeared to be two black males.

T. M. pp. 30-31

REDIRECT EXAMINATION

BY MR. SICKELS:

7. Now, you indicated that you were at a location somewhere away from the robbery scene, is that correct?

A. That is correct.

Q. But it is also my understanding that you did not know in which direction they had left the gas station?

A. That is correct.

Q. So if they were travelling south, east, west, or north, they would have been going away from the scene, isn't that right?

A. Certainly.

Q. And the citizen's information that you received did not indicate whether it was, in fact, a '67 Impala or an Oldsmobile Vista Cruiser?

A. Correct.

Q. And when the vehicle passed your location, you were merely following it, is that correct?

A. I was attempting to catch up to it to make a possible identification.

Q. And you only went one quarter of a mile?

A. No, sir. We went a little bit further than a quarter of a mile, I believe. I did not measure the distance from the driveway to where I was sitting on Hoadly Road and Davis Ford; I would estimate between a quarter to a half mile, closer to a half mile.

Q. Did you ever get a reading of what type of shotgun it was?

A. What type? My shotgun or their shotgun?

Q. It was reported that it was a 12-gauge shotgun.

A. I do not recall being told the gauge of the shotgun on the lookout.

EXCERTS FROM TRANSCRIPT OF THE TRIAL IN THE PRINCE WILLIAM CIRCUIT COURT

SEPTEMBER 7, 1977

T. T. pp. 4-5

THE CLERK: As I call your name, will you please have a seat in the jury box in the order that I call you. Beginning with the first seat in the back row—

MR. FOX: If I may interrupt—there are two indictments against this man. Maybe we should—

MR. SICKELS: May we approach the bench, Your Honor?

(The following was had at the bench, outside of the hearing of the prospective jurors.)

MR. SICKELS: Your Honor, there are two indictments against this individual. I purposely had asked that the Court allow separate trials. The Commonwealth Attorney has just said, in the presence of the jury, that there are two indictments against this individual. Therefore, I move that the jury panel be dismissed.

THE COURT: I will deny the motion. I didn't know that there were two indictments to the case. I didn't know.

MR. SICKELS: Note my exception.

MR. FOX: I didn't know they were separate. I thought they were being tried together. That's why I said that there were two.

THE COURT: Okay.

(The proceedings resumed within the hearing of the Court.)

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 771802

JERRY CARTER SKINNER

v.

COMMONWEALTH OF VIRGINIA

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Defendant, JERRY CARTER SKINNER, files this his Notice of Appeal from the judgment rendered by the Virginia Supreme Court on March 29, 1978, said judgment finding him guilty of robbery. The Defendant, JERRY CARTER SKINNER, will petition the United States Supreme Court to grant him a Writ of Certiorari pursuant to Title 28 United States Code § 1257(3).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June, 1978, three copies of this Notice of Appeal were served upon the Respondent by depositing the same in the United States Mail, first class, postage prepaid, in envelopes addressed to the Honorable J. Marshall Coleman, Attorney General, 1101 East Broad Street, Richmond, Virginia 23219, and to Paul Ebert, Commonwealth Attorney, 9304 Peabody Street, Manassas, Virginia 22110. I further certify that all parties required to be

served have been served, pursuant to Rule 33 of the Rules of the Supreme Court of the United States.

FARLEY, HARRINGTON &
SICKELS

/s/ _____

Charles W. Sickels
10560 Main Street, Suite 211
Fairfax, Virginia 22030

Attorney for Petitioner

Supreme Court, U. S.
FILED
SEP 27 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 77-1832

JERRY CARTER SKINNER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

MARSHALL COLEMAN
Attorney General of Virginia

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Supreme Court Building
Richmond, Virginia 23219

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

OPINION BELOW

There is no reported Opinion of the Supreme Court of Virginia. The Order rejecting the Petition for Appeal is set forth in petitioner's Appendix.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Officer Poindexter had probable cause to arrest the petitioner for robbery.

2. Whether the statement by the Commonwealth's Attorney violated the due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On September 7, 1977, the petitioner was arraigned for the robbery of Steven Blevins and pled not guilty. A jury heard the evidence and sentenced him to fifteen years in the penitentiary.

Steven Blevins testified that he was robbed by two black males on October 8, 1976, at approximately 2:15 a.m. After untying himself, Blevins called the police and gave a description of the robbers and their automobile.

Officer Walter Poindexter received a radio broadcast at 2:20 a.m. reporting the robbery. The radio dispatcher described the suspects as two black males, one armed with a shotgun, driving a faded blue or silver 1967 Impala station wagon. Poindexter proceeded to the intersection of Davis Ford Road and Hoadly Road. An additional description of Virginia tags and a number 1 Virginia inspection sticker was transmitted by the responding officer from the robbery scene. Another officer radioed that a citizen had advised him that a vehicle matching the description was westbound on Davis Ford Road at a high rate of speed. Shortly after the broadcast of the responding officer, Poindexter spotted the suspects' vehicle, a silvery blue 1967 Oldsmobile station wagon. The vehicle gave a right-turn signal, a left-turn signal, and pulled into a private driveway. Poindexter stated that the driver was lying down in the seat. Another officer aided in frisking the two black males for weapons. A shotgun stock was observed through the opened door on the floorboard. Both individuals were arrested at that time for robbery.

A suppression hearing was held on August 26, 1977, where the defendant's Motion to Suppress the Evidence and Arrest was denied. At the hearing, Officer Poindexter described the similarities of a 1967 Impala station wagon and a 1967 Oldsmobile station wagon.

At trial, the Commonwealth's Attorney, believing that the robbery and firearm indictments were to be tried together, responded to the trial judge "there are two indictments against this man." The defendant's motion to dismiss the jury panel was also denied.

ARGUMENT AGAINST GRANTING OF WRIT OF CERTIORARI

I.

Officer Poindexter Had Probable Cause To Arrest The Petitioner For Robbery.

Probable cause exists when the facts and circumstances known to the arresting officer are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Draper* v. *United States,* 358 U.S. 307 (1959); *Brinegar* v. *United States,* 338 U.S. 160 (1949); *Schaum* v. *Commonwealth,* 215 Va. 498, 211 S.E.2d 73 (1975). The standard of probable cause is determined by the probabilities of factual and practical considerations confronting the arresting officer, not legal technicians.

The facts adduced at the motion to suppress hearing and trial provide ample support for the arresting officer's on-the-scene determination that probable cause existed for the arrest of the defendant. An initial radio broadcast at 2:20 a.m., supplemented by another dispatch at 2:23 a.m., indicated that the suspects were two black males, one armed

with a shotgun, driving a faded blue or silver 1967 Impala station wagon with unknown Virginia license numbers and a number 1 Virginia inspection sticker. The officer positioned himself at an intersection on Davis Ford Road with his lights out. Another officer radioed a citizen's report that a vehicle matching that description was westbound on Davis Ford Road, traveling at a high rate of speed. The station wagon matching the time frame, description and direction of travel, passed the intersection where Poindexter was waiting. He followed the vehicle and observed the car give a right-turn signal without an entrance on that side, then gave a left-turn signal and enter a private driveway. The officer stopped behind the vehicle and observed that it was a silvery blue 1967 Oldsmobile station wagon with a Virginia license, containing two black males. The driver was prone on the front seat with his legs sticking out the door. After the police officer identified himself, the driver got out of the car and raised the hood. Several proddings later, the driver walked back around the car and responded to the officer's orders.

The matching of vehicle and physical descriptions from the three radio broadcasts, coupled with the synchronization of time and direction of travel from the early hour robbery scene, gave the police officer ample probable cause for the arrest.

II.

The Statement By The Commonwealth's Attorney Did Not Violate The Due Process Cause Of The Fourteenth Amendment To The United States Constitution.

The Commonwealth's Attorney, believing that two indictments would be combined in one trial, told the trial judge "there are two indictments against this man."

In questioning the jury, the defense attorney asked "would any member of the panel find it difficult to reach a verdict based solely upon the evidence, rather than the fact of the indictment?" The jury panel made no response. After examining the panel, the attorney indicated to the trial judge that the jury was acceptable. Further, the jury was instructed at the conclusion of the evidence that the indictment by the Grand Jury was not evidence against the defendant and it must not influence their verdict. This inadvertent comment by the Commonwealth's Attorney was miniscule and harmless when compared to the overall circumstances and the corrective action of the trial court.

In *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), the Supreme Court stated that when a petitioner raises the claim that his due process rights were violated as a result of a prejudicial remark by the prosecutor, the merit of the claim will depend upon the totality of the circumstances such that "each case necessarily turns on its own facts." *Id.,* at 240. Furthermore, in *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974), the Supreme Court expressly recognized that federal appellate review of state court proceedings is "the narrow one of due process, and not the broad exercise of supervisory power" that an appellate court would possess in regard to its own trial court. *Id.,* at 642. In *Donnelly,* the Court noted it had taken special care to assure that prosecutorial conduct in no way infringed upon a defendant's rights in those cases where the defendant alleged that the prosecutor's comment so prejudiced a specific provision of the Bill of Rights, as to amount to a denial of that right. After reviewing the record in *Donnelly,* the Supreme Court held against the defendant stating that "here the claim is only that a prosecutor's remark . . .

so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*, at 643.

The Commonwealth contends that the petitioner at bar has asserted essentially the same allegation and thus his case should be controlled by the *Donnelly* decision and therefore dismissed.

CONCLUSION

For the foregoing reasons the respondent respectfully submits that this Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

JAMES E. KULP
Deputy Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Deputy Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 27th day of September, 1978, I mailed with first class postage prepaid three true copies of this Respondent's Brief in Opposition to Granting of Writ of Certiorari to Charles W. Sickels, Esquire, 10560 Main Street, Suite 211, Fairfax, Virginia 22030.

JAMES E. KULP
Deputy Attorney General